IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2005 Session

AMERICAN GENERAL EQUITY SERVICES CORP., ET AL. v. JOHNNY WILLIAM SCHABLIK, ET AL.

Appeal from the Chancery Court for Sumner County
No. 2004C-225 Thomas E. Gray, Chancellor

No. M2004-03011-COA-R9-CV - Filed November 17, 2005

Johnny William Schablik and Marian Bloodworth Schablik ("Plaintiffs") sued American General Equity Services Corporation ("American General") and John Colvin ("Colvin") claiming Colvin made material misrepresentations regarding how Plaintiffs' assets would be invested and that these misrepresentations resulted in Plaintiffs losing their entire savings of $115,638.25. Relying on documents containing an arbitration clause and signed by Plaintiffs, American General filed a motion to stay the proceedings and compel arbitration. The Trial Court denied the motion, but granted American General's request for a Tenn. R. App. 9 interlocutory appeal. We then granted American General's request for a Rule 9 interlocutory appeal. The primary issue is whether the Trial Court correctly determined that Plaintiffs could not be compelled to arbitrate their state law claims because they arose in a securities context. We reverse the judgment of the Trial Court.

Interlocutory Appeal Pursuant to Rule 9, Tenn. R. App. P.
Judgment of the Chancery Court Reversed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

John N. Bolus, T. Louis Coppedge, and Kip A. Nesmith, Birmingham, Alabama, and Anna M. Grizzle, Nashville, Tennessee, for the Appellant American General Equity Services Corporation.

Keith C. Dennen, Sharon O. Jacobs, and Anne C. Martin, Nashville, Tennessee, for the Appellees Johnny William Schablik and Marian Bloodworth Schablik.

OPINION

Background

Plaintiffs filed this lawsuit in the Sumner County Chancery Court. According to the complaint, Colvin was an investment advisor employed during the relevant time period by American General, a registered broker/dealer for the sale of securities and variable annuities.[1] Plaintiffs, who are retired, attended an investment seminar held at their church during which they claim Colvin presented information on estate planning targeted primarily at senior citizens. Following the seminar, Plaintiffs contacted the seminar organizers seeking to have new wills and other documents prepared. At some point, Colvin approached Plaintiffs about transferring their current brokerage account to American General. Plaintiffs claim Colvin made representations "regarding his ability to provide comprehensive investment advisory services, including making recommendations with respect to appropriate investments for … [Plaintiffs] in light of their finances, potential future financial needs and age." Colvin allegedly assured Plaintiffs that he would invest their funds in safe, low risk investments with a guaranteed rate of return. Plaintiffs claim they relied on these representations and invested their entire savings of $115,638.25 with Colvin and American General. Plaintiffs further claim that contrary to the assurances they had been given, Colvin invested all of their assets in several high risk investments which were not suitable for Plaintiffs given their age, total assets, etc. The companies in which Colvin invested Plaintiffs' assets eventually ceased operations and/or went bankrupt, resulting in Plaintiffs losing their entire investment of $115,638.25. Plaintiffs sued Colvin and American General alleging negligent misrepresentation, gross negligence, fraud, intentional misrepresentation, a violation of the Tennessee Adult Protection Act, Tenn. Code Ann. § 71-6-101, *et seq.*, and a violation of the Tennessee Securities Act, Tenn. Code Ann. § 48-2-101 *et seq.*

Plaintiffs signed certain documents when their accounts were opened with American General. Of relevance to this appeal is a single, two-sided document. Each Plaintiff signed a separate but identical document. The following is contained toward the bottom of the first side of each document:

> **Please review your information, read the Agreement on the reverse side, and sign below**
>
> **Notice: This document contains a pre-dispute arbitration clause, which appears on the reverse side at paragraphs 13 and 14.**
>
> Customer's Signature **X** _____ Date _____

[1] American General was known as Franklin Financial Services Corporation during part of the relevant time frame. For ease of reference only, we refer to this defendant as American General throughout this Opinion.

On the back-side of this document is an "Agreement" consisting of fourteen numbered paragraphs with the last two paragraphs being an arbitration clause. These two paragraphs are the only paragraphs on the page which contain all capital letters and bold type. The arbitration agreement provides:

13. ARBITRATION DISCLOSURES

- **ARBITRATION IS FINAL AND BINDING ON THE PARTIES.**

- **THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT INCLUDING THE RIGHT TO A JURY TRIAL.**

- **PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS.**

- **THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.**

- **THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.**

14. AGREEMENT TO ARBITRATE CONTROVERSIES

IT IS AGREED THAT ANY CONTROVERSY BETWEEN US ARISING OUT OF YOUR BUSINESS OR THE AGREEMENT SHALL BE SUBMITTED TO ARBITRATION CONDUCTED BEFORE THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. AND IN ACCORDANCE WITH ITS RULES. ARBITRATION MUST BE COMMENCED BY SERVICE UPON THE OTHER PARTY OF A WRITTEN DEMAND FOR ARBITRATION OR A WRITTEN NOTICE OF INTENTION TO ARBITRATE.

> **NO PERSON SHALL BRING A PUTATIVE OR CERTIFIED CLASS ACTION TO ARBITRATION, NOR SEEK TO ENFORCE ANY PRE-DISPUTE ARBITRATION AGREEMENT AGAINST ANY PERSON WHO HAS INITIATED IN COURT A PUTATIVE CLASS ACTION; OR WHO IS A MEMBER OF A PUTATIVE CLASS ACTION WHO HAS NOT OPTED OUT OF THE CLASS WITH RESPECT TO ANY CLAIMS ENCOMPASSED BY THE PUTATIVE CLASS ACTION UNTIL: (i) THE CLASS CERTIFICATION IS DENIED; (ii) THE CLASS ACTION IS DECERTIFIED; OR (iii) THE CUSTOMER IS EXCLUDED FORM THE CLASS BY THE COURT. SUCH FORBEARANCE TO ENFORCE AN AGREEMENT TO ARBITRATE SHALL NOT CONSTITUTE A WAIVER OF ANY RIGHTS UNDER THIS AGREEMENT EXCEPT TO THE EXTENT STATED HEREIN.**

In response to the complaint, American General filed a motion to stay the proceedings and to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*., and the Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-301 *et seq*. The Trial Court denied American General's motion to stay the proceedings and compel arbitration, although no specific reason for the denial was set forth in that order. American General then filed a request for permission to take an interlocutory appeal pursuant to Rule 9, Tenn. R. App. P.[2] The Trial Court granted the request for an interlocutory appeal and, in so doing, explained its reasons for denying the motion to compel arbitration as follows:

> In determining that this motion [requesting permission to file an interlocutory appeal] should be granted, the Court determines, pursuant to Rule 9(a)(3) of the Tennessee Rules of Appellate Procedure, that there is a need to develop a uniform body of law on the legal issues raised in the Order. In reaching this determination, the Court gives consideration of the ruling by the Tennessee Supreme Court in the case of *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996), that arguably conflicts with the Order on the issue of the enforceability of an arbitration clause in an adhesion contract. In particular, in granting American General's motion, the Court gives

[2] We note that Colvin retained his own attorneys and, based on the record on appeal, he has not taken the position that the claims against him are subject to the arbitration agreement. We can only assume it is for this reason that Colvin did not file a brief on appeal. In any event, that issue is not before us and we express no opinion on whether any claims asserted against Colvin are subject to arbitration.

consideration to the following questions of law that either have not heretofore been decided by the Tennessee appellate courts or are not clearly established:

1. Whether a securities contract between an investor and a broker-dealer, printed on a standardized form and offered on a take-it-or-leave-it basis is, inherently, a contract of adhesion.

2. Whether an arbitration clause in an adhesion contract in the securities context is valid and enforceable when the terms of the arbitration clause are not one-sided and are not unreasonably favorable to one party or oppressive to the other.

We granted American General's request for an interlocutory appeal pursuant to Tenn. R. App. P. 9, and now undertake to examine the two questions as posed by the Trial Court.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The first issue as set forth by the Trial Court is whether the contract between the parties was "inherently, a contract of adhesion." The Trial Court concluded that the arbitration agreement was part of an adhesion contract because it was printed on a standardized form and offered on a take-it-or-leave-it basis. In *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996), our Supreme Court defined an adhesion contract as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Id*. at 320 (quoting *Black's Law Dictionary* 40 (6th ed. 1990); *Broemmer v. Abortion Services of Phoenix Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992)). There is little doubt that the contract signed by Plaintiffs was a standardized form contract, and we agree with the Trial Court's conclusion on this particular point.

Even though the contract was a standardized form contract, the record contains absolutely no proof via affidavit or otherwise that it was offered to Plaintiffs on a take-it-or-leave-it basis. We were confronted with a similar lack of proof in *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001). *Pyburn* involved the purchase of a Chevrolet van by the plaintiff

who claimed that he was forced to sign a separate arbitration agreement during the purchasing process. We observed:

> There is little or no doubt that the [Arbitration] Agreement is a standard form contract offered to Defendant's customers. The only evidence that Plaintiff had to sign this Agreement on a "take it or leave it" basis is his affidavit in which he states it was his "understanding" that he had to sign the Agreement. He does not allege, however, that he actually was required or told by Defendant that he had to sign the document before he would be sold the van. There is no evidence that Plaintiff questioned Defendant about the contents of the Agreement or did not understand what it meant. *See Wilson Pharmacy, Inc. v. General Computer Corp.*, 2000 WL 1421561, No. E2000-00733-COA-R3-CV (Tenn. Ct. App., Sept. 21, 2000)("[W]e do not believe the statements in the affidavit of Mr. Wilson that he did not know of any other computer corporation which would provide a comparable service, or the conclusory statement that he was offered a standardized contract 'on a take-it-or-leave-it basis' are sufficient to show a contract of adhesion . . . ."). As noted by the Trial Court, Plaintiff could have bought a van elsewhere if he did not want to agree to the Arbitration Agreement.

Pyburn, 63 S.W.3d at 359-60.

In the present case, Plaintiffs have offered no proof that they actually were required to acquiesce to the arbitration agreement prior to doing business with Colvin or American General. Likewise, Plaintiffs have offered no proof that they questioned Defendants about the arbitration agreement, that they did not fully understand what it meant, or that they could not have invested their money elsewhere had they refused to agree to an arbitration clause.

Even if we assume for present purposes only that Plaintiffs did establish that the contract was offered on a take-it-or-leave-it basis and that it was an adhesion contract, our analysis is not completed. As noted in *Pyburn*:

> Even if the Agreement is an adhesion contract, this does not end our inquiry because contracts of adhesion still may be enforceable. "Enforceability generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable". *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996). Adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party will not be enforced. *Id*.

Pyburn, 63 S.W.3d at 360.

The second issue as framed by the Trial Court is whether an arbitration agreement in an adhesion contract is enforceable in a securities context when the terms of the arbitration agreement "are not one-sided and are not unreasonably favorable to one party or oppressive to the other." Stated another way, the second issue simply is whether an arbitration agreement which is not unconscionable but is contained in an adhesion contract can be enforced if the claims arise in a securities context. We again turn to *Pyburn* to help resolve this issue. In *Pyburn*, the plaintiff argued that he could not be forced to arbitrate a claim brought pursuant to the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.* We rejected this argument pursuant to the Supremacy Clause of the United States Constitution, stating:

> T.C.A. § 47-18-109 provides that any person who suffers an ascertainable loss as a result of an unfair or deceptive act may bring an action in a court of competent jurisdiction. Plaintiff argues that if the Agreement is enforced, it would be a contract wherein he waived his right to a judicial forum under T.C.A. § 47-18-109, a result which is prohibited by T.C.A. § 47-18-113.
>
> Plaintiff's argument is in direct conflict with several decisions of the United States Supreme Court. For example, in *Perry v. Thomas*, 482 U.S. 483, 491, 107 S. Ct. 2520, 2526, 96 L.Ed.2d 426 (1987), the Supreme Court held that a California statute requiring litigants to be provided a judicial forum for resolving wage disputes "must give way" to Congress' intent to provide for enforcement of arbitration agreements with the FAA. Likewise, in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L.Ed.2d 1 (1984), the Supreme Court held that the California Franchise Investment Law which required judicial consideration of claims brought pursuant to that statute was preempted by the FAA. In so doing, the Supreme Court stated that "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Keating*, 465 U.S. at 10, 104 S. Ct. at 858. Plaintiff's argument is not one that would invalidate this arbitration agreement "upon such grounds that exist at law or equity for the revocation of any contract." *Dobson*, 513 U.S. at 281, 115 S. Ct. at 843. Rather, we would be using the TCPA as a basis for ignoring any arbitration agreement subject to that law. Such a holding would give to Tennessee the power to require a judicial forum for the resolution of claims arising under the TCPA even though the contracting parties had agreed to resolve any such claims by arbitration. This is exactly what is

> prohibited by the FAA. *Id. See also Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987)(the "Texas Public Accountancy Act of 1979 is not a ground that exists at law or in equity for the revocation of any contract, and it cannot overcome the strong federal interest in arbitration."). Likewise, the TCPA is not a ground that exists at law or equity for the revocation of any contract, and, therefore, it cannot serve as a basis for defeating the Agreement. Based on these clear holdings by the United States Supreme Court, Plaintiff's argument that he cannot "waive" his right to have a TCPA claim heard in a judicial forum must fail.
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> It is important to note that nowhere in the Agreement did Plaintiff actually waive any substantive rights he may have under the TCPA. Plaintiff, instead, agreed to submit those claims described in the Agreement to an arbitral forum. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 481, 109 S. Ct. 1917, 1920, 104 L.Ed.2d 526 (1989)("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.") (citations omitted).

Pyburn, 63 S.W.3d at 361-62.

The Tennessee Securities Act is not a ground that existed at law or in equity for the revocation of a contract and cannot be held to overcome the strong federal interest in arbitration. Congress certainly has the power to exempt particular federal or state claims from the scope of the Federal Arbitration Act and, at the same time, the Tennessee Legislature has the power to exempt particular state law claims from the scope of the Tennessee Uniform Arbitration Act. However, the Tennessee Legislature does not have the authority to exempt state law claims from the scope of the Federal Arbitration Act. Neither does this Court.

For all intents and purposes, the Trial Court found that the arbitration agreement at issue in the present case was not unconscionable, and the facts certainly do not preponderate against this finding. We hold that Plaintiffs' claims arising in a securities context, including those securities claims arising under the Tennessee Securities Act, are not outside the scope of the Federal Arbitration Act solely because they arise in a securities context. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that a claim brought under Section 10(b) of the federal Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), must be sent to arbitration in accordance with the terms of the arbitration agreement at issue in that case); *Peters v. Commonwealth Associates*, No. 03A01-9508-CV-00295, 1996 Tenn. App. LEXIS 140 (Tenn. Ct. App. Mar. 5, 1996) (applying the Tennessee Uniform Arbitration Act and concluding that an arbitration agreement was not voided by the provisions of the Tennessee Securities Act of 1980). Specifically, we hold that the fact that the arbitration clause is in a "contract in the securities

context...” does not render the Federal Arbitration Act inapplicable as relevant to the demand for arbitration. As the Trial Court’s conclusion to the contrary appears to have been the basis for its ruling, the Trial Court erred when it denied, on that basis, American General’s Motion to Compel Arbitration.

Conclusion

The Order of the Trial Court is reversed and this cause is remanded to the Trial Court with instructions to proceed in accordance with this Opinion and our Judgment. Costs on appeal are assessed against the Appellees, Johnny William Schablik and Marian Bloodworth Schablik.

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D. MICHAEL SWINEY, JUDGE